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Forum Choice in Constitutional Litigation

Josephine R. Potuto
University of Nebraska College of Law, jpotuto1@unl.edu

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I. INTRODUCTION

There are many substantive and procedural matters potentially relevant to constructing a constitutional case and, more particularly for this Article, critical in deciding where to sue and what claims to include. My purpose is not to provide a full exploration of each topic but rather to provide an introduction and general guide containing amplification sufficient to identify in a concrete case whether and which topics should be pursued further. Choice of forum requires a balance of competing factors, some of which point to state court and others to federal court. The most—and the least—that a good constitutional litigator can do is to evaluate the topics presented here and make an informed decision.

In Part II, I provide a list of topics with just enough discussion to make sense of the case illustration provided in Part III. In Part IV, I provide amplified, textual discussion with case citations pointing the way to fuller exploration of each topic.

II. THE PRELIMINARIES

A. A Few Things to Consider

1. Are you primarily a constitutional litigator or primarily representing a client's interests?

2. Are there state constitutional or statutory claims that arise out of the factual setting that you should consider including? What is their relative strength as against possible federal constitutional or statutory claims?

3. Should you try to settle?

4. Should (must) you first pursue administrative remedies or may you proceed directly to court?

5. Keep your eye on the procedure. Make a paper trail.

B. Picking the Forum: In General

Factors influencing forum choice include:

1. Perception as to whether a state or federal judge will be more receptive to your claims. Some litigators worry that state court judges

will be less receptive to constitutional claims than federal judges because state judges hear comparatively fewer of them.

2. If there will be a jury, whether jury composition will be different in state, contrasted with federal, court and how this difference will affect jury receptivity to particular claims.

3. Statutes of limitation and other procedural issues—generally the law of the forum controls these questions. Differences between state and federal procedure may affect the progress of litigation and enhance, or limit, the opportunity to advance and prevail on substantive claims.

4. Comparative speed at which a case will proceed to hearing.

5. Obviously, factors such as time, money, client goals and energy that inform forum choice in litigation generally also are relevant to a constitutional case.

C. Picking the Forum: Issues Particular to Constitutional Litigation

1. *Doctrine of Independent and Adequate State Grounds.* This doctrine applies only to state court litigation. When a state ground is independent and adequate then the Supreme Court of the United States has no power to review a federal ground that also may have been raised and/or decided.

If an analysis of federal law and judicial receptivity to a federal claim leads to a conclusion that the Supreme Court is unlikely to find a right in federal law, and a similar analysis of state law leads to a conclusion that there is a better likelihood of success on a state claim, then instituting suit in state court and insulating a state claim as the only ground of decision is an option worth considering. There is a downside to this approach. If a plaintiff raises and focuses exclusively on a state ground, then by definition (s)he foregoes reliance on a possible federal ground. Not only that, proceeding solely on a state ground likely means relinquishing any chance subsequently to litigate a federal claim because the failure to litigate in the first action most likely will be a procedural default barring relitigation.

2. *Erie*[1]*-type Considerations.* A federal judge faced with a question arising out of state law must decide it the way that the state court would. If there is an existing, but stale, state court decision on point, the great likelihood is that a federal judge will follow that existing decision. When a plaintiff seeks a change in state law, then, a state forum should be chosen because it offers the only realistic possibility for achieving change. Conversely, when a plaintiff seeks continuation of an existing state court approach, then federal court is likely the right place to be because there is little risk that the state court ap-

1. Erie R.R. Co. v. Thompkins, 304 U.S. 64 (1938).

proach will be abandoned. Choosing a federal forum, however, is no guarantee that a federal judge will decide the state question as she instead might employ *Pullman*[2] abstention or certify a state question to a state supreme court.

3. *Pullman Abstention.* When a federal question case brought in federal court includes a state question, *Pullman* abstention may be employed. *Pullman* abstention means that a federal judge refers the state question to a state court for resolution and waits to decide the case docketed in federal court until after final decision in state court. *Pullman* abstention most often is employed when resolution of a federal question necessarily requires resolution of an unsettled question of state law.

4. *Certification of State Question.* Some states have statutes permitting a state supreme court to resolve state law questions brought in federal court. What happens is that the federal judge certifies the question to the state supreme court and proceeds with federal court litigation once the state supreme court responds.

5. *Justiciability.* Justiciability considerations dictate whether a particular lawsuit may be brought. They are more likely to affect litigation in federal court because the federal courts have stricter requirements than many state courts and, except in a few isolated instances, no state court has stricter requirements than the federal courts.

6. *State Sovereign Immunity and the Eleventh Amendment.* State sovereign immunity may preclude litigation against a state in state or federal court. Sovereign immunity effectively means that actions against a state in state court typically are heard only pursuant to a state tort claims act. Actions against a state in federal court involve the scope of the Eleventh Amendment.

The Eleventh Amendment prohibits a federal judge from hearing a suit against a state unless the state consents or congress has exercised its constitutional authority to abrogate the state's immunity. Where neither has occurred, a state may be sued neither for damages nor even injunctive relief.

7. *Federal Civil Rights Lawsuit under 28 U.S.C. § 1983.* Section 1983 authorizes lawsuits against state officers for violation of federal rights. While state sovereign immunity makes section 1983 unavailable for suits against a state, it does not preclude suits against a city or county.

8. *The Ex Parte Young*[3] *Fiction.* When the Eleventh Amendment bars a federal court suit against a state, the *Ex parte Young* fiction nonetheless permits bringing a claim against a state officer that in

2. Railroad Comm'n v. Pullman, 312 U.S. 496 (1941).
3. *Ex parte* Young, 209 U.S. 123 (1908).

substance binds the state. Three conditions must be met: (i) the state officer must have been acting in her official capacity; (ii) the activity must be alleged to violate federal law; and (iii) the remedy sought may be equitable only.

9. *Supplemental (Pendent) Jurisdiction.* Supplemental jurisdiction is the means by which a claim based on state law may be heard in federal court even though there is no diversity. For such a state claim to be heard, there must be a federal claim in the case, and both state and federal claims must arise out of the same nucleus of operative fact.

10. *Younger v. Harris*[4] *Abstention. Younger v. Harris* abstention is the typical federal court response when a litigant seeks an injunction against a pending state criminal proceeding (or civil proceeding such as contempt that involves what the Supreme Court characterizes as issues of paramount state interest). To obtain an injunction, a plaintiff must meet the requirements otherwise necessary for an injunction and also show that the state court prosecution is motivated by bad faith harassment.

11. *Claim and Issue Preclusion.* Preclusion, whether claim or issue, eliminates the opportunity for parties to relitigate in a second lawsuit matters that were central to a prior lawsuit. Where the subject matter is the same in the two lawsuits, claim preclusion (res judicata) gives preclusive effect in the second lawsuit to everything that was or could and should have been raised in the first lawsuit. Where the subject matter is different, issue preclusion (collateral estoppel) precludes relitigation of an issue both actually and necessarily decided. Questions as to what is precluded are resolved by reference to the preclusion law of the jurisdiction whose court rendered the original judgment.

12. *Administrative Procedures Act.* All states and the federal government have statutes governing appeals from agency decisions that provide only limited court review of an agency hearing decision.

III. CONSTITUTIONAL LITIGATION HYPOTHETICAL

The hypothetical provided here illustrates the importance for constitutional litigation of the various concepts set forth in Part II. In one sense, the hypothetical is entirely unrealistic because it creates what will not be found in life—a state agency to handle building permits and a jail sentence for violation of a statute governing building permits. But in another sense, that which is critical for this Article, the hypothetical IS realistic because it permits a full discussion of the decision tree that must be employed when deciding what claims to raise and in which court system to bring suit.

4. Younger v. Harris, 401 U.S. 452 (1974).

WHAT LIKELIHOOD CANDLES IN THE CATHEDRAL?

You represent the Roman Catholic diocese of Nebraska. The diocesan cathedral is seventy-five years old. It is built of concrete, marble, and plaster. The only wood in the church is that used in the pews and kneelers. The only fabric is the altar skirt.

The cathedral is scheduled for major renovation, including an addition to its front half. In the front alcoves on either side of the altar, there are racks of votary candles that have been in place since the cathedral was built. Not all the candles are lit at any one time. A candle is lit when a supplicant chooses to make a special prayer.

Bishop Raymond, pastor of the cathedral, applied to the State Commissioner of the Interior for a building permit for church renovation. A recently enacted state statute provides: "No public building hereinafter constructed may contain open flame devices. A building in violation will be shut down until brought into compliance. The person responsible for the violation is subject to six months imprisonment and a fine of up to $1000 per day for each day of violation." Citing the statute, the commissioner refused to issue the building permit so long as the plan of the cathedral included the votive candles.

Bishop Raymond comes to you for advice. You read the statute and note that the statute does not directly mention churches and that nothing in it explicitly refers to renovation as compared to new construction. You learn that, under state law, an interpretation of a statute provided by the State Commissioner of the Interior must be appealed to a hearing officer in the State Agency of the Interior and then may be appealed to a state trial court under the State Administrative Procedures Act.

Bishop Raymond is emphatic that he wants to challenge the candle prohibition in the renovated cathedral and equally emphatic that he wants to assure that the statute is not applied to churches, whether for renovations or new buildings.

What to do and where to do it?

A. Potential Claims

Bishop Raymond has available a federal constitutional and state statutory claim. The federal constitutional claim is the abridgement of the First Amendment free exercise of religion. The state claim is based on the commissioner's interpretation of the statute to include churches as public buildings and renovation as well as new construction.

B. Whether to Settle

The question whether to attempt to settle is easily resolved on these facts by Bishop Raymond's clear interest in establishing precedent that exempts churches from the reach of the statute.

C. Administrative Remedies and Estoppel

State law specifies that decisions by the State Commissioner of the Interior may be challenged in court only after exhaustion of administrative remedies. This means that you may not litigate your claim in state court (at least, not without first challenging the constitutionality of this restriction on your right to sue), and this also means that no state court review is possible until after you submit for agency hearing your challenge to the commissioner's interpretation of the statute. You will need to examine agency jurisdiction and state joinder and estoppel law to decide whether you also must submit the free exercise claim.

Assume you bring your claims to the state agency. The state permits appeal of an adverse agency decision to a state trial court. Your decision whether to appeal depends on whether you seek to sue in federal court. Federal preclusion law does not foreclose a lawsuit based on a prior administrative decision, but it generally prohibits a later lawsuit if an administrative decision is appealed to a state court and under that state's estoppel law, the state court appeal bars a subsequent lawsuit in state court.

D. *Erie* Type Complications

The building permit is new. Because there are no reported Nebraska decisions, you need neither select nor avoid state court to achieve a change in, or assure a continuation of, existing Nebraska caselaw.

E. Considerations Particular to Suit in Federal Court

1. *Justiciability Issues.* The justiciability issues most likely to have an impact on litigation are mootness, ripeness, and standing. Neither ripeness nor mootness problems arise on these facts.

The case is ripe—Bishop Raymond is ready to renovate. He has clear and concrete plans. He is stopped from proceeding by the denial of the permit. The only possible ripeness issue relates to Bishop Raymond's challenge to the statute's applicability to new construction.

The case is not moot, nor likely to be so while litigation proceeds. Even if Bishop Raymond elects to renovate without waiting for a permit, the case will not be moot because this choice subjects him to jail and fine.

Standing, too, is unlikely to be an impediment to a federal court suit. The only potential standing issue also relates to Bishop Raymond's challenge to the statute's applicability to new construction since he is not harmed by that aspect of the statute. His challenge to its applicability to churches clearly applies to the cathedral. His challenge to its applicability to renovation clearly applies to the cathedral. Assuming that the statutory construction claim may be heard in federal court,[5] Bishop Raymond may be able to claim injury even as to new construction based on his position as representative of the entire diocese.

2. *The Eleventh Amendment Means a Federal Lawsuit May Be Maintained Only on the Free Exercise Claim.*

a. The first claim—free exercise—is based on federal law. You likely will frame the claim as a federal civil rights violation under section 1983.[6] Since Congress has not abrogated a state's Eleventh Amendment immunity for section 1983 lawsuits, the first thing you must check is whether the state has waived sovereign immunity for this type of lawsuit. You investigate and learn that the state has not. Therefore, if you sue in federal court you may name neither the state nor a state agency as a party to the lawsuit. The *Ex parte Young* fiction will permit you to avoid the bar of the Eleventh Amendment by suing the commissioner in his official capacity, but only for an injunction. Thus, a claim under section 1983 will be a claim against the commissioner for injunctive relief for violation of Bishop Raymond's First Amendment free exercise rights.

b. The second claim—the commissioner's interpretation of the statute—is based on state law. Section 1983 is unavailable for assertion of state-based claims. That means you cannot transpose the state claim into a federal claim. As a consequence, the only potential independent basis of jurisdiction for this claim is diversity. But there is no diversity because Bishop Raymond and the commissioner are both Nebraska residents.

c. Another option permitting litigation of the state claim in federal court is supplemental (pendent) jurisdiction. Bishop Raymond's state claim clearly arises out of the same nucleus of operative fact as his federal claim. At first glance, then, it would appear that you may include the state claim as a second count and pend it to the federal claim. Unfortunately, however, Bishop Raymond's state claim may not be pended because the Eleventh Amendment stands in the way. The suit against the commissioner effectively is a suit against the state. While the *Ex parte Young* fiction is a way around the Eleventh Amendment that permits a federal court to hear a suit that effectively

5. As I describe later, this claim cannot be heard in federal court, not because it is not justiciable but because of the Eleventh Amendment. *See infra* Part III.E.2.

6. 42 U.S.C. § 1983 (1994 & Supp. III 1997).

is against the state, the fiction applies to state officer violation of federal law only. The commissioner's interpretation of a state statute presents a state-based claim that is barred by the Eleventh Amendment.

A lawsuit in federal court, then, may be maintained only on the free exercise claim. If you seek to bring the state claim too, then you must sue in state court.

3. *Pullman Abstention.* The commissioner's interpretation of the state statute presents a classic opportunity for the employment of *Pullman* abstention. The question whether the statute, as interpreted by the commissioner, violates Bishop Raymond's free exercise rights depends on whether the commissioner has correctly interpreted the statute. The statute is newly enacted. There are no existing court opinions interpreting it or describing its scope. Should the commissioner move for federal court abstention on the basis of *Pullman*, he stands a fair chance of succeeding. Similarly, if there is a certification procedure available to test the commissioner's construction of the statute, the federal judge may elect to certify the question to the state supreme court.

Pullman abstention is not an unfavorable outcome to a plaintiff who wants a state court decision on a state claim and a federal court decision on a federal claim. For various reasons, a defendant's employment of *Pullman* abstention is one way, and perhaps the only effective way, for a plaintiff to achieve that result. A plaintiff may not bring suit in federal court and, at the same time, petition a federal judge to abstain. However, a plaintiff interested in bifurcating claims should consider ways to optimize the chance that a defendant will move for *Pullman* abstention.

The likelihood is that you will oppose a federal court decision to abstain because this will run up costs and produce delay. Bishop Raymond may well want to begin cathedral renovation as soon as possible. If it is important to contain costs and obtain a decision as quickly as possible, then the risk of *Pullman* abstention may mean you should sue in state court. Your other option is to wait and see whether abstention is requested and granted. If you are remitted to state court, at that point you can submit the entire case for state court decision and move to dismiss the federal court litigation.

4. *Maintaining Two Lawsuits: The Effect of Estoppel Law.* As I just demonstrated, it is not possible to join Bishop Raymond's state and federal claims in a lawsuit in federal court. Bifurcation of claims might be achieved by *Pullman* abstention. Could it also be achieved in the first instance by suing in a state court on the state claim and in federal court on the federal claim? It would have to be quite an unusual situation before such an option even would be considered, as reasons of efficiency and economy argue against such a choice. But

assume that yours is the unusual case. Consider what may happen if you bifurcate.

a. First, consider the effect of claim preclusion (res judicata) when the federal court action comes to final judgment first. There are two potential outcomes. The first is much more likely, but not guaranteed. Claim preclusion applies only to those matters that were raised and litigated or could and should have been raised and litigated. By definition, the state claim is not one that could have been litigated in federal court. On this analysis, then, there will be no claim preclusion if the federal court comes to final decision first. Alternatively, the case could be analyzed as follows: Although the federal court was unavailable to hear the state claim, there was a general jurisdiction court (state court) that could have heard both claims. The failure to sue where both claims could be heard will work an estoppel.

b. Next, consider the effect of claim preclusion when the state court action comes to final judgment first. Here, there generally is no question that the state court answer will effect a claim preclusion on the federal court action because the state court was open to hear both state and federal claims. The only exception will be a situation in which the state court lawsuit was simply an appeal of an agency decision and the agency had no jurisdiction to entertain the federal constitutional claim.

c. Even if the federal court decision does not preclude bringing a state court action, there still is the possibility of issue preclusion, as issue preclusion is not dependent on whether the claim in the subsequent litigation could have been raised in the earlier litigation but instead runs to any issue between the parties that necessarily was decided. Issue preclusion also, obviously, would run from state to federal court.

d. In the absence of *Pullman* abstention, your best shot at obtaining two separate decisions, neither obviated by claim preclusion, would be to file the federal court action first and wait to file the state court action until after the federal action is far enough along to assure that it will proceed to final judgment before the state court judgment.

5. *Bishop Raymond Risks Jail.* Bishop Raymond may choose to renovate without permit if he is sufficiently persuaded of the rightness of his cause and the likelihood that he will prevail on the merits. If he is wrong, however, then he is in jeopardy of a jail sentence and fine. He could seek a federal court injunction against institution of a prosecution against him. However, his chances of success are zero as a federal judge will employ *Younger v. Harris* abstention.

6. *Switching Gears: Assume a City Ordinance Rather Than a State Statute Prohibits Candles in the Cathedral.* In this situation, the Eleventh Amendment impediment disappears as a city may be sued in federal court under section 1983 without offending the Elev-

enth Amendment. You can name the city. You can sue the city for damages as well as injunctive relief. Damages against the city will require that Bishop Raymond prove that the city in its own right violated his free exercise rights and those of his church. Cities are not vicariously liable under section 1983 for the actions of their employees. Respondeat superior does not apply.

IV. AMPLIFIED DISCUSSION WITH CITATIONS

A. The Lawyer's Think List

While there are differences between litigating a constitutional case and litigation generally, by and large the same techniques of litigation apply to both. What I highlight here are some issues of particular importance in constitutional litigation.

1. *What's the Main Goal? Client Interest or Making Law*? Are you primarily a constitutional litigator or are you primarily representing the interest of your client? A variation of this question arises when the client is an institutional client with long-range interests that go beyond the particular case.

If the main goal is making law, then:

a. First and foremost, you must have the consent and participation of your client. Her interest may be best served by a quick and satisfactory settlement, and she must understand the consequences of choosing litigation.

b. If your client is willing to make her case a test case, then you still need to consider whether the facts warrant proceeding that way.

You need to evaluate the type case you are litigating as well as the energy level of your adversary. If you have particularly good facts—and your client's consent—you may want to arrange things so that settlement is not a realistic possibility. Conversely, if your client prefers settlement to potentially protracted and fractious litigation or if there is a very good chance of very bad precedent being set, then not litigating may be the best solution.

Consider the actions of the Black Leadership Forum, a combination of Civil Rights groups, that shared in paying a settlement to Sharon Taxman, a white school teacher who claimed an equal protection violation when she was laid off solely on the basis of race while an African-American teacher was retained.[7] The Forum was fearful of a decision by the Supreme Court of the United States that would eliminate affirmative action as a remedy for equal protection violations unless the particular employer engaged in purposeful discrimination. To avoid that result, the civil rights groups were willing both to pay a

7. *See* Taxman v. Board of Educ. of Piscataway, 91 F.3d 1547, 1549-50 (3d Cir. 1996).

large part of the settlement and to endure public discussion of their negative assessment of obtaining a favorable decision on affirmative action.[8]

2. *Look to Others Litigating Related Cases with Whom You Should Consult.* There may be special interest civil liberties litigation groups that have ideas and particular strategies that would be helpful. They may be able to point you to effective trial strategy. You need to consider whether there is a long-range game plan that you should hook into. Consider Justice Marshall and the desegregation cases. It was not serendipity that the separate but equal cases were litigated in a particular order and that the miscegenation statutes were not the first to be attacked.

If the main goal is representing a client, then the impact on other litigation is not a concern. Your calculus here is simply the calculus in which you would engage in any litigation. The general rule is to avoid litigation if you can. That keeps costs down and solves problems most expeditiously.

3. *Follow the Procedural Steps. Keep a Good Paper Trail.*

a. Make sure your client has done the appropriate things in the appropriate way. If not, go back and take corrective actions if you can. There is no sense litigating only to find an earlier default is an impediment to success. Advise your client to get or put things in writing. That means not assuming what an administrator's reaction will be, but (i) having your client engage in the challenged behavior and getting the administrative reaction or (ii) writing a letter describing what she wants to do and waiting for a response or (iii) better yet, writing a letter describing the anticipated response and asking the administrator to respond in writing if you are wrong.

b. If your main litigation goal is obtaining the best result for your client in the most expeditious fashion then, before going to court, you may want to give your adversary a chance to back down, settle, or compromise. You need to write and say, "You are doing A. If you do not stop doing A, then I will advise my client to sue, get an injunction, etc."

4. *Keep Your Eye on the Record.* Talk to an appellate lawyer before litigating. Think about the record on appeal while litigating. The only facts you can point to on appeal are those which were in evidence at trial. No matter how persuasive, helpful, and even dispositive certain facts might be, if they are not in the record, then they cannot help you with the factfinder and, for purposes of appeal, they do not exist.

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8. *See* Nat Hentoff, *A Victim of Affirmative Action*, VILLAGE VOICE, Jan. 6, 1998, at 20, 20.

B. Administrative Remedy or Lawsuit

1. *Exhaustion.* Often you will be required to exhaust state administrative remedies before suing. Certain federal claims require exhaustion of state administrative procedures while others, in particular section 1983 claims, do not. When, as with section 1983 claims, the particular violation alleged provides a choice whether to submit a claim to an agency or to proceed directly to court, you should consider whether you have a better likelihood of prevailing before an agency. Under most statutory schemes, after final agency determination, you will be able to appeal to a court. Such an appeal typically will be on an administrative standard of review where reversal occurs only if the decision is found to be:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations of statutory rights;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence . . . ; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by a reviewing court.[9]

2. *Potential Claim Preclusion on Later Federal Court Action.* For certain federal claims, appeal of a state administrative decision to state court may foreclose a later full trial on the merits in federal court. The federal courts are required to give the same preclusive effect to a judgment as would be given in the jurisdiction whose court rendered the judgment. Although section 1738[10] applies to judicial and not administrative proceedings, the Supreme Court has applied the statute to a Title VII claim in which a litigant followed the Title VII statutory mandate by first submitting her claim to a state agency.[11] Section 1738 was triggered when the litigant appealed the state agency decision to a state court for review on an APA standard of review.[12] You may avoid such preclusive effect by not appealing an adverse agency decision.[13]

C. Independent and Adequate State Grounds

1. *A state supreme court is the last word on the meaning and scope of that state's law.* If a state-based claim is the only claim litigated in state court, then that claim typically is not reviewable by the Supreme Court of the United States. Suppose, however, that you are in state

9. Administrative Procedure Act, 5 U.S.C. § 706(2) (1994).
10. 28 U.S.C. § 1738 (1994).
11. *See* Kremer v. Chemical Constr. Corp., 456 U.S. 461, 484 (1982) (finding that Title VII contains no legislative intent to deny res judicata).
12. *See id.* at 464.
13. *See* University of Tenn. v. Elliott, 478 U.S. 788, 798-99 (1986).

court and raise both state and federal claims (or your adversary raises a federal claim in response to your state-based claim). The doctrine of independent and adequate state grounds may still preclude Supreme Court review. If a state ground is independent (in other words, it is sufficient in itself to sustain the judgment) and adequate (in other words, the decision does not violate federal law), then the Supreme Court has no power to review the decision. A state court may decide a federal claim as an alternative ground for its decision. A state court may decide a state claim yet cite to federal precedent in so doing. So long as the state court makes clear that it is deciding and relying solely on the state ground for its decision, then the Supreme Court may not review.[14]

You cannot make a ground adequate merely by claiming violation only of state law. A ground is adequate only if its resolution cannot be said to violate federal law. For example, assume you represent the state and claim that a warrantless search of a dwelling place was constitutional under the state constitution. Assume also that the state supreme court agrees. If the defendant claims that such a warrantless search violates the federal Fourth Amendment, then the Supreme Court still has power to review. This is true even if the state supreme court includes a clear statement that any discussion of federal constitutional law was unnecessary for its decision and that it relies exclusively on the state ground. A state ground must be independent and adequate both in form and substance.

2. *The independent and adequate state ground may be substantive (the example provided above) or procedural.* A procedural ground will be adequate so long as state procedure meets minimal due process standards,[15] applies evenhandedly to both state and federal claims, is supported by prior state practice,[16] and does not pose too great a burden on the opportunity to have a federal claim heard.[17]

3. *Consider what may happen if you raise two grounds for relief, one state and one federal.*[18] The trial judge decides the state ground in a way favorable to you but does not decide the federal ground. You

14. *See* Michigan v. Long, 463 U.S. 1032, 1040-41 (1983).
15. *See, e.g.*, Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 (1930).
16. *See, e.g.*, James v. Kentucky, 466 U.S. 341, 350 (1984).
17. *See, e.g.*, Douglas v. Alabama, 380 U.S. 415, 418-19 (1965).
18. The discussion in text is framed as one in which there is a federal and a state ground. If instead both claims derived from state law, then the issue of Supreme Court review of a substantive claim would no longer be present as there would no longer be a federal question triggering the power to review. The problem that arises when a trial judge decides only one of two claims and stops is still present, however. You still should try to persuade the trial judge to decide the second ground. Moreover, any refusal to consider the second ground when properly raised and preserved will trigger potential review by the Supreme Court of the United States as to whether state procedure as implemented violates procedural due process.

should move for a decision on the federal ground. One problem if you don't do this—and it can be costly—is that, in some states, neither side can raise the federal ground on appeal because neither side lost on it. If the state appellate court reverses on the state ground, then you have a right to a decision on the remaining federal ground, but you will likely be remanded for decision and may have to have a second trial. Another problem—and this is fatal to you—is that your state procedure may require, in order to preserve the federal ground for subsequent resolution, that you move before the trial judge for decision on that ground. Your failure to so move will be a procedural default that will prevent you from getting the federal claim heard.

You very well may be unsuccessful in getting a trial judge to decide both claims, particularly if the federal claim is a constitutional one. In the first place, you are asking a judge to do work she thinks is unnecessary. Moreover, a constitutional claim triggers a canon of construction which dictates that a judge decide non-constitutional claims first and, if possible, decide them to the exclusion of constitutional ones.[19]

To avoid a procedural default, it is unnecessary that the judge does as you request. That, after all, is ultimately out of your control. What is critical is that you do everything in state procedure to preserve your right for decision on the claim. At a minimum, you should move on the record for a decision on the federal ground.

D. Article III and Prudential Justiciability Issues (Standing, Mootness, Ripeness, etc.)

Justiciability constraints dictate when and by whom a lawsuit may be brought. They more likely will affect your opportunity to sue in federal rather than state court because federal court justiciability requirements, except in isolated cases,[20] are stricter that those of state courts. Federal court justiciability constraints are ticking time bombs that may be raised by a litigant, even the plaintiff, at any point in the litigation or by a federal judge on her own motion.[21]

1. *Standing.* Standing has both constitutional (Article III)[22] and prudential aspects to it. Article III requires that a plaintiff have "a personal stake" in the litigation.[23] That means that the plaintiff must have injury in fact running to her that is "fairly traceable" to the de-

19. *See, e.g.*, Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175 (1909).

20. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 262 n.8 (1977).

21. *See* FED. R. CIV. P. 12(b)(6); Raines v. Byrd, 521 U.S. 811, 825-26 (1997); DeFunis v. Odegaard, 416 U.S. 312, 315-16 (1974).

22. U.S. CONST. art. III, § 2.

23. Warth v. Seldin, 422 U.S. 490, 498 (1975).

fendant's conduct *and* that is redressable by the remedy sought.[24] Article III justiciability constraints limit all federal courts, including the Supreme Court of the United States on a case originating in a state court.

Be careful about the remedy that you seek. Particularly in equal protection cases, an injunction may result in a dismissal because an injunction does not guarantee that a plaintiff can get the remedy he seeks even with a winning case on the merits. This is so because equality may be achieved by bringing the plaintiff up to the standard of others, in which case the plaintiff would get the substantive result she seeks, or by bringing the others down to the standard of the plaintiff, in which case the plaintiff would get equal protection but not the substantive result sought.[25]

In addition to the constitutional limits prescribed by Article III, the Supreme Court has enunciated prudential standing concerns that, when applicable, ordinarily result in federal court refusal to entertain a lawsuit. A "generalized grievance" shared by large numbers of citizens is not one that a federal court typically will hear.[26] Further, a plaintiff suffering actual injury typically also must show that his claim is based on a legal right that belongs to him and not to another.[27] This latter consideration minimizes the opportunity for a third party standing case to be heard in federal court. Prudential standing may be overridden by countervailing interests in a particular case or by express congressional authorization in a class of cases.[28]

2. *Ripeness.* Ripeness means a controversy is not yet ready to be heard.[29] It is closely related to standing. Standing focuses on the litigants before the court while ripeness focuses on the status of the claim.

3. *Mootness.* Mootness means that a controversy has become stale because by the time it was ready for court resolution the plaintiff's injury no longer was redressable by the remedy sought. For example, a litigant seeking to divorce who challenges a one-year residency requirement may have resided in a state longer than one year (and may have obtained a divorce) by the time her case is heard.[30] There are four strategies that can save a case from dismissal on mootness grounds. First, if possible you can substitute plaintiffs with live

24. *See* Allen v. Wright, 468 U.S. 737, 751 (1984); Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 44-46 (1976).
25. *See Simon*, 426 U.S. at 44-46. Notwithstanding potential problems with injunctive relief, at times that may be your only alternative. *See infra* text accompanying note 30.
26. *See Warth*, 422 U.S. at 499.
27. *See id.*
28. *See, e.g.*, Bennett v. Spear, 520 U.S. 154, 162-63 (1997).
29. *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 101-02 (1983).
30. *See* Sosna v. Iowa, 419 U.S. 393, 398-99 (1975).

claims for plaintiffs whose claims are about to become moot. Second, you can join several individuals as plaintiffs, individuals who are differently related in time to the claim. This strategy may be prevented or limited by standing requirements, however. Third, if possible and otherwise advisable, a plaintiff can request damages and not simply an injunction. Damages redress past injury suffered while an injunction, by contrast, is forward-seeking and cannot remedy a violation for a plaintiff who no longer is in a situation to suffer injury. Recognize, however, that a request for damages means a jury trial and you may prefer to try the matter to a judge. In addition, sovereign immunity issues may mean that damages cannot be requested. Fourth, a lawsuit may be saved from dismissal on mootness grounds if it proceeds as a class action.[31] With a revolving class, at any given time there is a person to keep the controversy live. At given points, you may have to substitute for the class representative another member of the class.

E. *Pullman* Abstention

Pullman abstention most often comes into play when a plaintiff brings a federal question action in federal court and there is imbedded in that action an unsettled question of state law that necessarily must be resolved.[32] A federal judge may exercise discretion to abstain from deciding a federal question until after a state court resolves a state law issue. Factors relevant to a decision to abstain are the newness of state law, the importance of the law to a state, the absence of state cases construing the law, and the fact that a particular state construction would obviate the need to decide a federal constitutional claim.

Pullman abstention is available in section 1983 actions brought in federal court.[33] *Pullman* abstention also is available when a federal lawsuit challenges the constitutionality of a state statute under the federal constitution and a lawsuit pending in state court challenges the constitutionality of the statute under the state constitution.[34] *Pullman* abstention occasionally even has been employed in diversity cases.[35]

Pullman abstention typically means that a federal judge stays, rather than dismisses, the federal court proceeding. Retaining jurisdiction permits a federal judge to provide interim relief or to reactivate the federal case in the event of undue delay or other difficulty in state court.

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31. *See* FED. R. CIV. P. 23; *Sosna*, 419 U.S. at 399; United States Parole Comm'n v. Geraghty, 445 U.S. 388, 398 (1980); Richardson v. Ramirez, 418 U.S. 24, 40 (1974) (holding that state class actions are justiciable in federal court).
32. *See* Railroad Comm'n v. Pullman, 312 U.S. 496, 501 (1941).
33. *See* Harrison v. NAACP, 360 U.S. 167, 169, 176 (1959).
34. Askew v. Hargrave, 401 U.S. 476, 477-78 (1971).
35. *See, e.g.*, Fornaris v. Ridge Tool Co., 400 U.S. 41, 44 (1970).

A plaintiff remitted to state court may elect to submit both state and federal claims to the state court,[36] or he may preserve his right to return to federal court on the federal claim by not seeking "a complete and final adjudication of his rights in a state court."[37] On occasion, a state court will be unable adequately to resolve the state question—particularly, in an applied context—unless the federal question is presented to it. So long as the plaintiff is clear that he reserves his right to return to federal court on the federal claim, the state court judgment will have no res judicata effect even if the state court decides the federal question.

Many states[38] today have a statutory procedure by which a federal court may certify a state question to a state supreme court.[39] Such a procedure effectively substitutes for *Pullman* abstention. It permits a federal court to retain a case and yet have the state supreme court, the final authority on state law, resolve the state question.

F. Supplemental (Pendent) Jurisdiction

Supplemental (pendent) jurisdiction[40] is the means by which a claim based on state law may be heard in federal court even though there is no diversity between plaintiffs and defendants. Simply put, when non-diverse parties raise a state claim that arises out of the same nucleus of operative fact as a federal question claim also being brought in federal court, then the state claim may be pended to the federal claim.[41] Pendent jurisdiction permits a federal judge in her discretion to consider this pended state claim even if the federal claim ultimately drops out and requires that a federal judge consider this pended state claim before considering a federal constitutional claim.[42]

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36. When a plaintiff submits both state and federal claims to the state court, the loser in state court may petition the Supreme Court of the United States to grant a writ of certiorari. *See* NAACP v. Button, 371 U.S. 415, 427-28 (1963).

37. *Cf.* England v. Louisiana State Bd., 375 U.S. 411, 419 (1964) (internal quotation marks omitted).

38. Not all states provide for supreme court resolution of certified questions. *See, e.g.*, Michaels v. New Jersey, 150 F.3d 257, 259 (3d Cir. 1998). In a state with justiciability requirements equivalent to those operative in the federal courts, a certification process likely would be unconstitutional under the state constitution.

39. For an example of a court certifying a question to a state supreme court, see *Ageloff v. Delta Airlines, Inc.*, 860 F.2d 379, 388 (11th Cir. 1988).

40. *See* 28 U.S.C. § 1367 (1994). Section 1367 also covers what formerly was known as ancillary jurisdiction.

41. *See* United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 725 (1966).

42. *See* Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 192 (1909).

G. Interplay of Supplemental Jurisdiction and *Ex Parte Young*

On occasion a plaintiff may allege that a state officer acted in violation of both federal and state law. Absent the wrinkle caused by the Eleventh Amendment, the general rule of supplemental jurisdiction would permit both claims to be heard in federal court if they both arose out of a common nucleus of operative fact. Here's the wrinkle: the *Ex parte Young* fiction waives the Eleventh Amendment bar for suits alleging state officer violation of federal, but not state, law. That means that the Eleventh Amendment stands as a bar to a federal court hearing a claim against a state officer that is based on state law even when that claim otherwise may properly be pended to a federal claim.[43]

H. State Sovereign Immunity: Actions Brought in State Court

State sovereign immunity involves actions brought against a state in either state or federal court. In both courts, the general rule is that a state may be sued only with its consent or pursuant to congressional abrogation of its sovereign immunity where Congress has the constitutional authority to abrogate. The Eleventh Amendment governs actions in federal court but does not, by its terms, speak to actions brought in state court. At best, congressional power to abrogate is no broader in state than federal court. In state court, Congress may use its Article I legislative power to abrogate state sovereign immunity only if there is "compelling evidence" that states were required to do this at the inception of constitutional democracy in the United States and that so doing is consistent with the history and structure of the Constitution.[44] What appears true, but is by no means guaranteed, is that Congress may use section 5 of the Fourteenth Amendment to abrogate state sovereign immunity in state court actions in any circumstance in which it may do so in federal court actions.[45] The scope of that power is discussed later.[46]

A state may choose whether and what actions may be brought against it in its own courts by its own citizens or citizens of other states or nations.[47] The most common, and most important, vehicle

43. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121 (1984).
44. *See* Alden v. Maine, 119 S. Ct. 2240, 2255 (1999).
45. *See id.* at 2267. The *Ex parte Young* fiction, *see supra* Part III.E.2 (discussing *Ex parte Young* with regard to the Eleventh Amendment and federal court actions), also applies in state court and permits a state-court suit for injunctive relief against a state officer. *See* General Oil Co. v. Crain, 209 U.S. 211, 226-27 (1908).
46. *See infra* text accompanying notes 53-68.
47. It even appears possible that a state may waive its sovereign immunity for a state-based claim and refuse to do so for a federal claim. *See Alden*, 119 S. Ct. at

by which a state waives its sovereign immunity is a state tort claims act.

1. *Persons Covered by State Tort Claims Act.* State tort claims acts typically cover employees of a state, state agencies, and members of boards or commissions when acting in their official capacities. The operative phrase, "employee of the state," is analogous to the phrase, "employee of the government," in the Federal Tort Claims Act.[48] An "employee of the government" is anyone who is in a master-servant relationship with an agency. To resolve questions under the federal act, courts have tended to apply the common law principle that looks to the degree of control exercised by the agency over the details of the employment. The greater the control the more likely that the individual is treated as an employee and not as an independent contractor.

2. *Scope of Liability.* State tort claims acts typically are the exclusive vehicle for recovery against a state for anyone who claims to be injured by a state employee. These acts typically exempt a state from any liability for intentional torts. They also typically exempt from liability discretionary functions or duties even if the discretion is abused. A state employee may be sued outside the contours of the state tort claims act but only in her personal capacity.[49]

Assuming that (a) a plaintiff's claim is grounded in a tort cognizable under a state tort claims act, (b) the state employee's activity does not involve a discretionary act, and (c) the plaintiff is successful in proving commission of the tort, there nonetheless is typically no liability if the state employee exercised due care in enforcing a statute, rule, or regulation. A plaintiff may recover against a state, therefore, only if a state employee failed to exercise due care.

3. *Political Subdivisions Tort Claims Act.* Many states have political subdivisions tort claims acts that cover employees of political subdivisions in the same manner and to the same extent that a state tort claims act covers state employees.

I. Actions Brought in Federal Court: The Eleventh Amendment

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

2268. If true, sovereign immunity would trump federal law prohibiting discrimination against federal rights. *But see* Testa v. Katt, 330 U.S. 386, 392-93 (1947); Mondou v. New York, New Haven, & Hartford R.R. Co., 223 U.S. 1, 56 (1912).

48. 28 U.S.C. § 1346(b) (1994 & Supp. III 1997).

49. While a state employee remains liable in her personal capacity for any legally cognizable injury, she either will be judgment proof or at least not have pockets as deep as her state employer. This, however, may not be quite the obstacle it seems. You should investigate whether the state for which the employee works provides subrogation to employees for personal liability when the claim arose out of their official duties.

States by citizens of another state, or by citizens or subjects of any foreign state.[50]

1. *General Principles*

a. The United States may sue a state in state or federal district court. The theory is that a state's joining the union is a waiver of sovereign immunity as against the greater sovereign. Whether and when a suit nominally brought by the United States may be treated for purposes of sovereign immunity as one in fact brought by the United States is not entirely clear. The question may well be the subject of increasing litigation.[51]

b. A state may sue a state in the original jurisdiction of the Supreme Court of the United States.

c. The Eleventh Amendment by its terms precludes a federal court from hearing suits against a state brought either by citizens of another state or by foreign citizens. Although it does not by its terms cover federal court suits brought against a state by citizens from that state, a majority of the Court has long held that principles of sovereign immunity in the Eleventh Amendment preclude a federal court from hearing the suit.[52]

2. *Exceptions to General Operation of Eleventh Amendment*

a. Congressional Abrogation

(i) In *Seminole Tribe v. Florida*,[53] the Court held that congressional power to avoid the Eleventh Amendment resides *only in* section 5 of the Fourteenth Amendment. Congressional power under section 5 is limited to the enforcement, not the creation, of rights.[54]

(ii) Moreover, there must be "congruence and proportionality" between the targeted injury and the statutory plan for remedying it.[55]

(iii) While Congress may waive state sovereign immunity pursuant to the due process clause of the Fourteenth Amendment, there is no section 5 power to define a property right.[56] Even when there is a property right, moreover, congressional enforcement power does not permit remedies for negligent state actions;[57] is triggered only where

50. U.S. CONST. amend. XI.

51. *See, e.g.*, United States *ex. rel.* Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999).

52. *See* Hans v. Louisiana, 134 U.S. 1, 10 (1890).

53. 517 U.S. 44 (1996).

54. *See* City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

55. *Id.* For age discrimination a state need show only a rational relationship between its employment decisions and their impact on older employees. *See* Kimel v. Florida Bd. of Regents, Nos. 98-791, 98-796, 2000 WL 14165 (U.S. Jan. 11, 2000).

56. *See* Florida Prepaid Postsecondary Educ. Expense Bd., v. College Sav. Bank, 119 S. Ct. 2199, 2208-09 (1999).

57. *See* Daniels v. Williams, 474 U.S. 327, 332-33 (1978).

state law remedies are inadequate;[58] is dependent on showing a pattern of constitutional violations by the states; and requires a remedy tailored to the pattern of violations.[59]

(iv) Under section 5 of the Fourteenth Amendment, Congress may abrogate a state's sovereign immunity in federal court with regard to actions brought by a citizen of a state against that state. Congress may permit both suits for damages and injunctive relief. Because the Fourteenth Amendment was adopted subsequent to the Eleventh Amendment, it is arguable that under section 5 of the Fourteenth Amendment, Congress may abrogate a state's sovereign immunity with regard to federal court actions brought against a state by citizens of other states and foreign citizens (that immunity, in other words, that was specifically recognized in the Eleventh Amendment).

(v) A precondition to a finding of congressional abrogation is that Congress must state explicitly an intention to abrogate.[60] Among the statutes in which Congress stated an explicit intention to abrogate state sovereign immunity are Title VII,[61] section 504 of the Rehabilitation Act of 1973,[62] Title IX,[63] the Age Discrimination Act of 1975,[64] and the Americans With Disabilities Act.[65] In legislation enacted prior to *Seminole Tribe*, where Congress abrogated state sovereign immunity without specific reference to section 5 of the Fourteenth

58. *See* Hudson v. Palmer, 468 U.S. 517, 539 (1984); Parratt v. Taylor, 451 U.S. 527, 543 (1981).

59. *See Florida Prepaid*, 119 S. Ct. at 2209-11. The lower courts are also litigating other cases concerning the scope of section 5 power with regard to what appear to be clear property rights. *See, e.g.*, Chavez v. Arte Publico Press, 139 F.3d 504, 508-09 (5th Cir. 1998) (holding that Congress enacted the copyright statute pursuant to section 5 of the 14th Amendment because of state court refusal to recognize copyright claim would deprive person of property without providing due process protections), *vacated*, 178 F.3d 281 (5th Cir. 1998), *and remanded*, 180 F.3d 674 (5th Cir. 1999) (for reconsideration in light of the Supreme Court's decision in *Florida Prepaid*).

60. See the statutory appendix for a more extensive, but still partial, list of statutes by which Congress stated an explicit intention to waive state sovereign immunity.

61. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 449 n.2 & 456 (1976).

62. *See* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, title X, § 1003, 42 U.S.C. § 2000d-7(a).

63. *See id.*

64. *See id.* The Supreme Court recently held that Congress had no power to abrogate state sovereign immunity with regard to the Age Discrimination in Employment Act despite an explicit statement of intention to abrogate. *See* Kimel v. Florida Bd. of Regents, Nos. 98-791, 98-796, 2000 WL 14165 (U.S. Jan. 11, 2000). The *Kimel* decision calls into question the constitutionality of the Age Discrimination Act of 1975.

65. *See* Americans with Disability Act of 1990, 42 U.S.C. § 12202 (1994).

Amendment, a current issue is whether any such abrogation is a constitutional exercise of congressional power.[66]

(vi) It is unclear the extent to which Congress may condition receipt of federal funds for a federal program on a state's waiver of sovereign immunity.[67]

(vii) Although originally a subject of dispute, it now appears clear that the Fourteenth Amendment power includes incorporated rights.

(viii) Although not entirely clear, it appears that a state that voluntarily litigates in federal court waives its Eleventh Amendment protection for counterclaims and crossclaims that arise out of the same fact transaction, at least up to the amount of the state's damages claim.[68]

(ix) Congress *has not* abrogated state sovereign immunity for purposes of section 1983 suits against a state. By contrast, there is no Eleventh Amendment bar for section 1983 suits against a city or county.

b. State Consent

A state may waive its sovereign immunity with regard to actions brought against it in federal court. Whether and the extent to which a state has waived sovereign immunity is a question of state law. Moreover, a state may waive all or part of its sovereign immunity for purposes of actions brought in state court and yet decline to waive sovereign immunity for federal court actions.[69]

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66. *See, e.g.*, Timmer v. Michigan Dep't of Commerce, 104 F.3d 833, 840-41 (6th Cir. 1997) (finding that Congress enacted the Equal Pay Act pursuant to section 5); Mayer v. University of Minn., 940 F. Supp. 1474, 1477 (D. Minn. 1966) (finding that Congress enacted the Rehabilitation Act and Americans with Disabilities Act pursuant to section 5). *See also* Pederson v. Louisiana State Univ., Nos. 94-30680, 96-30310, & 97-30719, 2000 WL 19350 (5th Cir. Jan. 27, 2000). The *Pederson* Court held, properly I think, that once congressional intent to abrogate is found the question of federal authority to abrogate is found objectively with regard to whether the subject matter falls within the 14th Amendment.

67. At one point, the Supreme Court held state receipt of federal funds would constitute consent to suit even in the absence of explicit statutory language. The theory was constructive waiver. *See* Parden v. Terminal Ry., 377 U.S. 184, 195-96 (1964). *Parden* now has been overruled. *See* Florida Prepaid Postsecondary Ed. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199, 2222 (1999). State consent will be found, therefore, only when "stated by the most express language or by such overwhelming implication from the text as will leave no room for any other reasonable construction." Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239-40 (1985) (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909)) (internal quote marks omitted). To date, however, the Court has not said whether clear and unequivocal language in connection with receipt of state funds always will operate as state consent no matter the scope and substance of federal legislation.

68. *See* Porto Rico v. Ramos, 232 U.S. 627, 631 (1914); Georgia Dep't of Human Resources v. Bell, 528 F. Supp. 17, 26 (N.D. Ga. 1981).

69. *See* Great Northern Life Ins. Co. v. Read, 322 U.S. 47, 53-54 (1944).

A state waives its sovereign immunity by statute.[70] It is nonetheless possible for a state with no statutory waiver to lose the protection of sovereign immunity in a particular litigation by failing to claim it. To the extent a state chooses to interpose a sovereign immunity claim, it may be possible to do so at any stage in the proceedings.[71]

3. *Actions Against a State in Federal Court*

If there is neither constitutional congressional abrogation nor state consent, then:

a. You cannot sue a state in federal court for damages.

b. You cannot sue a state in federal court for injunctive relief.

4. *The Ex Parte Young Fiction*

The *Ex parte Young* fiction has three components to it:

a. You name the state officer acting officially, and not the state, as the defendant in the lawsuit.

b. You sue for injunctive relief only. You cannot get damages or anything that looks like damages even if denominated equitable relief.[72]

c. You must allege a violation of a federal, not state, right by the state officer.[73]

In addition, a detailed statutory scheme for providing relief may override application of the *Ex parte Young* fiction.[74] A remote possible additional component is that because *Ex parte Young* is a discretionary doctrine, various factors (availability of state forum; severe adverse effect on federal/state comity) may lead a federal court to decline to employ the *Ex parte Young* fiction.[75]

Although damages are unavailable against a state under section 1983, if you are the prevailing party[76] you can get attorney fees paid out of a state treasury as fees are ancillary to the power to issue an injunction.[77] Similarly, you can get expert witness fees.[78] Fee agreements pose a difficult ethical problem for a constitutional litigator when a settlement offer potentially acceptable to a plaintiff exempts

70. *See* Ford Motor Co. v. Dep't of Transp., 323 U.S. 459, 468 (1945).
71. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 121-22 (1984); Edelman v. Jordan, 415 U.S. 651, 675-77 (1974).
72. *See Edelman*, 415 U.S. at 666-67.
73. *See Pennhurst*, 465 U.S. at 121.
74. *See* Seminole Tribe v. Florida, 517 U.S. 44, 75-76 (1996).
75. *See* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 296 (1997) (no majority opinion; second concurrence limits reach of holding to cases involving the functional equivalent of a quiet title action).
76. For discussion of the meaning of "prevailing party," see generally *Farrar v. Hobby*, 506 U.S. 103 (1992), and *Texas State Teachers Ass'n v. Garland Ind. Sch. Dist.*, 489 U.S. 782 (1989).
77. *See* 42 U.S.C. § 1988(b) (1994 & Supp. III 1997); *see also* Hutto v. Finney, 437 U.S. 678, 692 (1978).
78. *See* 42 U.S.C. § 1988(c) (1994 & Supp. III 1997).

defendants from responsibility for fees and costs (and thereby eliminates what may be the only reasonable possibility of lawyer payment).[79]

J. Federal Civil Rights Suit, 42 U.S.C. Section 1983

1. *State Employees*

a. Liability Under Section 1983

Section 1983 reads in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[80]

(i) Persons Subject to Suit. Section 1983 creates a federal cause of action for violation of a federal right by a state officer or employee acting within the scope of his employment at the time he committed the alleged violation. Section 1983 also covers private individuals when "engaged in conduct otherwise chargeable to the State."[81] Under section 1983, a person may not sue a state or state agency, but may employ the *Ex parte Young* fiction to sue a state officer acting officially for injunctive relief and also may sue a state employee in her personal capacity for damages, with the damages paid by her out of her personal financial resources.[82]

Anyone who is formally a state employee is a state actor under section 1983 with regard to all conduct undertaken within the scope of the state employment relationship. Those not formal employees of a state are nonetheless state actors for purposes of section 1983 when they enforce state statutes or rules or otherwise perform governmental functions authorized by a state. They are subject to section 1983 liability for conduct undertaken pursuant to their employment responsibilities that is considered governmental rather than private.

(ii) Scope of liability. There are two types of immunity available to state employees sued under section 1983: absolute and qualified. Absolute immunity means that there is no liability for conduct no matter how willful and no matter how clearly violative of a constitutional right. Qualified immunity permits a state employee to avoid liability when she can show that she violated no "clearly established statutory

79. *See* Evans v. Jeff D., 475 U.S. 717, 757 (1986).

80. 42 U.S.C. § 1983 (1994).

81. Wyatt v. Cole, 504 U.S. 158, 162 (1992) (private individuals enforcing rights under state replevin statute).

82. *See* Hafer v. Melo, 502 U.S. 21, 30-31 (1991); *see also supra* note 47 and accompanying text.

or constitutional rights of which a reasonable person would have known."[83]

The Supreme Court of the United States has indicated that qualified immunity is unavailable to at least some categories of private persons undertaking official functions.[84] The Court left unanswered whether a private person in these circumstances would have available an affirmative defense of good faith or probable cause.[85] What seems clear, however, is that if absence of good faith is an element of the particular tort alleged to have been committed, then a private person would at least have available the traditional tort defense to that tort.

State judicial officers have absolute immunity for actions undertaken within the scope of their judicial responsibilities.[86] Judicial absolute immunity has been extended to certain state administrative hearing officers,[87] but not to hearing officers who also serve as enforcement officers.[88]

State legislators have absolute immunity for actions undertaken within the scope of their legislative responsibilities.[89] Legislative absolute immunity extends to rulemaking activities of certain state administrators.[90] Similarly, legislative absolute immunity extends to local government officials acting in a legislative capacity when promulgating ordinances.[91]

Prosecutors have absolute immunity for actions that comprise the prosecutorial function.[92]

All state actors provided absolute immunity for actions within the scope of their official responsibilities have qualified immunity for actions outside that scope.

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83. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); *see also* Anderson v. Creighton, 483 U.S. 635, 641 (1987).

84. *See* Richardson v. McKnight, 521 U.S. 399, 411-13 (1997); Wyatt v. Cole, 504 U.S. 158, 168-69 (1992).

85. *See Wyatt*, 504 U.S. at 169.

86. *See* Mireles v. Waco, 502 U.S. 9, 11 (1991) (judicial function includes issuing order resulting in physically bringing lawyer to court); Stump v. Sparkman, 435 U.S. 349, 363-64 (1978).

87. *See* Scott v. Schmidt, 773 F.2d 160, 163-64 (7th Cir. 1985).

88. *See* Cleavinger v. Saxner, 474 U.S. 193, 205-07 (1985) (prison disciplinary proceedings).

89. *See* Tenney v. Brandhove, 341 U.S. 367, 379-80 (1951).

90. *See* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 405 (1979); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 613-14 (8th Cir. 1980) (absolute immunity for city zoning board plus private citizen proponents of zoning change).

91. *See* Bogan v. Scott-Harris, 118 S. Ct. 966, 973 (1998).

92. *See* Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976).

There is no vicarious liability under section 1983.[93] A supervisor can be personally liable in damages for injury arising out of employee conduct that violates section 1983, therefore, only if a) the supervisor ordered the conduct; or b) he can be treated as though he ordered the conduct because he did nothing to stop the conduct although there was a clear and recurring pattern of such conduct.

b. State Obligation to Defend. State tort claims acts typically provide that the attorney general of a state will defend (and that the state will pay court costs and fees for) any person sued under section 1983 who would be covered by a state tort claims act if sued in state court on a state cause of action. If a state employee is found liable in a section 1983 action, then the state has an action over against the employee for fees and costs. Thus, although a state may front fees and costs, there is potential repayment liability in an action against a state employee brought by a state for reimbursement of monies paid. The attorney general typically is the state officer who decides whether to institute a repayment action against a state employee. Generally, an attorney general undertakes such an action when the judgment establishes that the state employee acted outside the course of employment or that his conduct was a willful and wanton neglect of duty.

c. State Obligation to Pay Award. Under a typical state tort claims act, a state is obligated to pay any damages award entered in a section 1983 lawsuit so long as the judgment establishes neither that the conduct occurred outside the course of employment nor that it was a willful and wanton neglect of duty. Since a state employee has at least a qualified immunity under section 1983, any damages award must embody a decision that the state employee violated "clearly established statutory or constitutional rights of which a reasonable person would have known" (the qualified immunity standard).[94]

2. *Claims That May be Brought*

a. All Claims Except Those of Procedural Due Process and Negligence. As noted above, section 1983 creates a federal cause of action for violation of a federal right by a person who is or is deemed to be a state officer or employee acting within the scope of his employment.

b. Procedural Due Process Claims. Where a property interest is involved (a toaster; a house), then a state through its employees may not take and deliberately withhold or damage that property interest without providing procedural due process protections that meet federal constitutional minimum standards.[95] Assume a supervisor in a

93. Some federal statutes do provide for holding a city vicariously liable. *See, e.g.*, Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2282-94 (1998) (discussing vicarious liability under Title VII).

94. *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

95. *See* Parratt v. Taylor, 451 U.S. 527, 542 (1981); Hudson v. Palmer, 468 U.S. 517, 530-31 (1984).

state agency seizes an employee's toaster because he believes its presence is a fire hazard. The toaster is property. The owner of the toaster therefore is entitled to procedural due process with regard to its seizure. In this context, the process that is due is minimal and likely constitutes simply (i) advance notice to the toaster owner that the toaster must be removed from the premises or it will be confiscated; (ii) notice to the toaster owner of its taking; and (iii) an opportunity for the toaster owner to be heard regarding whether the item taken was a toaster and whether it constitutes a fire hazard.

c. Negligence Claims. If the toaster was lost through negligence by a state employee, there is no due process violation because there is no due process injury arising out of negligent acts.[96]

3. *Political Subdivisions*

Unlike a state, a political subdivision is a person for purposes of section 1983.[97] There is no vicarious liability under section 1983 for a political subdivision, however. A political subdivision can be liable for employee conduct that violates section 1983, therefore, only if the political subdivision, through high level employees with policy-making authority, either a) ordered the conduct; or b) can be treated as ordering the conduct because nothing was done to stop the conduct although there was a clear and recurring pattern of such conduct.[98] A pattern involving failure to train employees where that failure caused constitutional violations may result in section 1983 liability for the political subdivision.[99] But there is no general purpose in section 1983 to replace or enhance traditional state law tort remedies by converting these claims into allegations of due process deprivations.[100] Moreover, punitive damages may not be assessed against a city or county.[101]

4. *Conclusion Regarding State Employee Liability*

a. Persons Clearly State Employees. State employees acting within the scope of their state employment responsibilities who avoid willful and wanton conduct in causing tort injury will not be liable to a state for any damages paid to a plaintiff in a state tort claims act lawsuit. State employees who violate a federal constitutional protection may have absolute immunity under section 1983 and will have at least qualified immunity. In lawsuits under both state tort claims

96. *See* Daniels v. Williams, 474 U.S. 327, 328 (1978).

97. *See* Monell v. Department of Social Services, 436 U.S. 658, 690 (1978).

98. *See* Board of County Comm'rs v. Brown, 520 U.S. 397, 415 (1997); McMillian v. Monroe County, 502 U.S. 781, 784-85 (1997); City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986); City of Oklahoma City v. Tuttle, 471 U.S. 808, 821 (1985).

99. *See* City of Canton v. Harris, 489 U.S. 378, 380 (1989).

100. *See* Collins v. City of Harker Heights, 503 U.S. 115, 119 (1992).

101. *See* City of Newport v. Fact Concerns, Inc., 453 U.S. 247, 271 (1981).

acts and section 1983, moreover, a state's attorney general will enter to defend the lawsuit and will cover costs and fees.

b. Persons Not Clearly State Employees. Persons not formally employees of a state for purposes of a state tort claims act are subject to normal tort rules and subject to potential liability directly to a plaintiff. Under normal tort rules, many of the substantive tort actions potentially applicable have good faith defenses that may be asserted. Persons not formally employees of a state are subject to section 1983 liability only when their activities implicate governmental action.[102]

K. The *Erie* Factor

A federal court sitting in diversity follows the procedure of the Federal Rules of Civil Procedure but employs the substantive law of the state whose law governs the outcome of the litigation.[103] When state law is unsettled a federal judge is obliged to predict state law, not to create or modify it to satisfy his own predilections.[104] A prediction of state law means doing what a state supreme court would do if presented with the case. In theory, that means ignoring existing, but stale, state supreme court precedent if analysis of changes in state law in other areas and in the changes in resolution of the legal issue in other states lead a federal judge to conclude that the state supreme court would reject its stale precedent. I say "in theory" because there are relatively few instances in which a federal judge has ignored state precedent on point.[105]

L. *Bivens* Actions Against Federal Officers

There is no counterpart to section 1983 permitting a suit against a federal officer for violation of a federal right. It is possible, however, to state a claim for relief grounded in the Constitution itself.[106] These actions are known as *Bivens* actions. The extent to which Congress may supersede a *Bivens* action by providing a statutory claim for relief is not entirely clear. The Court initially took the position that it would provide remedies under *Bivens* unless (1) Congress "explicitly declared" its remedy to be a substitute for a *Bivens* remedy and (2) the

102. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 951 (1982).
103. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Hanna v. Plumer, 380 U.S. 460, 465 (1965).
104. *See* Lawrence v. Virginia Ins. Reciprocal, 979 F.2d 1053, 1055 (5th Cir. 1992).
105. In at least one instance in which a federal court ignored stale state precedent, the state court later followed that precedent, thereby demonstrating that the federal court predicted erroneously. *Compare* Cathey v. Johns-Manville Sales Co., 776 F.2d 1565, 1569 (6th Cir. 1985), *and* Murphree v. Raybestos-Manhattan, Inc., 696 F.2d 459, 463 (6th Cir. 1982), *with* Wyatt v. A-Best Products Co., 924 S.W.2d 98, 105 (Tenn. Ct. App. 1995).
106. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 390 (1971).

congressional remedy was "equally effective" with one the Court otherwise might provide.[107] Later cases suggest that the congressional remedy need meet neither requirement.[108] For *Bivens* remedies involving Fifth Amendment due process claims, moreover, there is reason to believe that the Federal Tort Claims Act will state the full scope of the remedy available.[109]

M. *Younger v. Harris* Abstention

In the Anti-Injunction Act[110] Congress directed federal courts not to interfere with or enjoin state court proceedings. One exception to the Act is express congressional authorization for federal courts to issue injunctions running to state court proceedings. Section 1983 actions have been held to embody such authorization.[111] The circumstances in which a federal court will enjoin a pending criminal prosecution, however, are exceedingly narrow. The Supreme Court, out of respect for "our federalism," has said that an injunction against a pending state prosecution may issue only when a litigant both meets the requirements otherwise necessary for an injunction (irreparable harm; remedy at law inadequate) and can show that the prosecution reflects bad faith harassment on the part of the state.[112]

State courts are equally competent with federal courts to hear and vindicate federal rights. Merely instituting a prosecution that allegedly is unconstitutional is not an example of bad faith harassment because typically the prosecution will provide a means by which a state court judge can decide whether the activity is constitutional. An example of bad faith harassment might be a prosecutor who repeatedly arrests a person for particular conduct and then repeatedly declines to prosecute. Even in this situation, where a federal court injunction might well issue, a person also has available a state court proceeding for issuance of an injunction.

1. *Deciding whether a state court proceeding is pending does not mean matching state and federal court filing dates to see which action first was filed.* Instead, it involves a decision whether the federal court injunctive action has progressed so far that it may be said to constitute "proceedings of substance on the merits."[113] If this stage has not been reached before the filing of a state court action, then the

107. *See* Carlson v. Green, 446 U.S. 14, 14-15 (1980) (Federal Tort Claims Act remedy not intended as substitute).
108. *See* Schweiker v. Chilicky, 487 U.S. 412, 422 (1988); United States v. Stanley, 483 U.S. 669, 683-84 (1987); Bush v. Lucas, 462 U.S. 367, 388-89 (1983); Chappell v. Wallace, 462 U.S. 296, 298 (1983).
109. *See* Weiss v. Lehman, 676 F.2d 1320, 1322 (9th Cir. 1982).
110. 28 U.S.C. § 2283 (1994).
111. *See* Younger v. Harris, 401 U.S. 37, 60 (1971).
112. *See id.* at 65.
113. *See* Hicks v. Miranda, 422 U.S. 332, 333 (1975).

state court action is pending for purposes of *Younger v. Harris* analysis.

2. *Declaratory Judgments.* Seeking a declaratory judgment from a federal court is not subject to the same requirement as an action to enjoin. Nonetheless, it is not entirely clear what the proper test is when a litigant seeks a declaratory judgment regarding the constitutionality of claims raised in a pending state criminal proceeding. The best guess is that the litigant would still need to show bad faith harassment. Where a criminal prosecution is threatened, but not yet pending, there need be no showing of bad faith harassment for a declaratory judgment action to proceed.[114] Nor need a litigant meet the requirements necessary for an injunction to issue. A litigant, of course, will have to meet federal court justiciability requirements.

Several interesting issues arise here. As an example, a litigant may obtain a preliminary injunction to prevent a state from filing a criminal prosecution once the declaratory injunction action is filed. As a second example, it is unclear whether a litigant with declaratory judgment in hand may proceed to obtain an injunction without additional showing. A series of other issues revolve around the estoppel effect of a declaratory judgment on a prosecution filed in the same case and the precedential effect of the declaratory judgment on a prosecution filed in a different case.[115]

3. *Younger v. Harris* is not the only potential impediment to federal court declaratory judgment action as notions of comity regarding the propriety of maintaining a second action when one already is pending also may dictate dismissal.

N. Claim Preclusion (Res Judicata) and Issue Preclusion (Collateral Estoppel): A Brief Description

1. *Claim Preclusion (Res Judicata)*

a. Examples

In successive lawsuits where the parties (read narrowly) and subject matter are the same, the first judgment has preclusive effect in the second lawsuit as to everything that was or could/should have been raised in the first lawsuit.

Example (i). Bruiser chops off two of Peaceful's fingers. Peaceful sues Bruiser for the loss of one finger. Peaceful wins. Then Peaceful sues for the loss of the second finger. Bruiser, greatly offended, yells, "Res Judicata." What result?

Bruiser will win. The court will find that Peaceful's rights—that which Peaceful asserted in the first lawsuit (the finger) and that which

114. *See* Steffel v. Thompson, 415 U.S. 452, 484 (1974).

115. *See generally id.* (discussion by various judges on these issues). It likely matters, moreover, whether the injunction issued in an applied or an on-its-face challenge.

Peaceful did not assert (the other finger)—merged. (Merger is the technical term to describe res judicata effect when the person who wins in the first lawsuit is greedy and seeks to get more in a second lawsuit.)

Example (ii). Same facts as in Example (i), but this time Peaceful loses in the first lawsuit. In the second lawsuit, Bruiser again yells, "Res Judicata." What result?

Bruiser will win. The court will find that the first judgment is a bar to the second try. (Bar is the technical term to describe res judicata effect when the person who loses in the first lawsuit is indefatigable and decides to try again.)

Example (iii). Same facts as in Example (i), but this time Bruiser also chops off the right front fender of Peaceful's car, causing $1,000+ worth of damages (Peaceful's fingers were resting on the car at the time of the chopping). There are courts in the state empowered to hear personal injury claims and courts empowered to hear property claims; no court is empowered to hear both.[116] Peaceful sues on the property claim and wins. Now Peaceful sues for the loss of the fingers. Bruiser, growing hoarse, against yells, "Res Judicata." What result?

Peaceful will win. The personal injury claim was not and could not have been litigated in the first suit.

Example (iv). Same facts as in Example (iii), but this time a court of general jurisdiction is available. Peaceful nonetheless sues only on the property claim in a court whose jurisdiction is limited to property claims. Peaceful wins. Now Peaceful goes to a court of general jurisdiction to sue for the loss of the fingers. Bruiser, a virtual Johnny One-Note, yells you know what. What result?

Answer 1. If strict res judicata principles are applied, Peaceful will win. The reason is the same as that given in (iii) above.

Answer 2. Even though Peaceful could not have raised the personal injury claim in the first lawsuit, Bruiser will win. The reason is that Peaceful could have found a court to hear both claims. It is Peaceful's choice, not peculiarities of state law, that led to the successive lawsuits.

b. The major caveat to the above examples is that everything said is based on the assumption (certainly valid here) that the loss of two fingers (and at least the loss of two fingers and property damage in Example (iv)) arising out of the same fact transaction will equal one cause of action. Courts sometimes play fast and loose with the defini-

116. While obviously the example in text—courts having, respectively, only personal injury or property claims juridiction—occurs nowhere in the real world, the problem of limited jurisdiction courts and the preclusive effect running to their judgments is a real one. *See* Meding v. Hurd, 607 F. Supp. 1088, 1097 (D. Del. 1985) (separate courts for law and equity).

tion of cause of action; res judicata does not apply where the successive lawsuits concern different causes of action.

2. *Issue Preclusion (Collateral Estoppel).* In successive lawsuits where the parties are the same (read more broadly for collateral estoppel than for res judicata purposes) but the subject matter is different, collateral estoppel will apply to preclude relitigation of an issue both actually and necessarily decided in the first lawsuit.

a. Examples

Example (i). Same facts as in Example 1.a.(iii). The trial on Peaceful's claim for the loss of two fingers is about to begin. Peaceful seeks to estop Bruiser from relitigating the liability question (in other words, Peaceful seeks to require the court to follow the first court's decision finding Bruiser liable and thus remove the liability issue from the second lawsuit). What result?

Answer 1. Peaceful will win. The liability issue actually and necessarily was decided in the first lawsuit. All that's left to prove now is that with the same chop that destroyed the fender Bruiser also chopped off two of Peaceful's fingers. This is the technically correct and logical answer for collateral estoppel purposes and would be the *only* answer but for the fact that the first lawsuit was in a court of limited jurisdiction.

Answer 2. Bruiser will win. Although the liability issue actually and necessarily was decided in the first lawsuit, to give it estoppel effect in the second lawsuit would translate the decision of a court of limited jurisdiction into a decision of a court of general jurisdiction (the liability issue regarding the loss of Peaceful's two fingers effectively will have been decided in the first lawsuit even though the loss of the two fingers could not have been litigated in the first lawsuit). This is the technically correct and logical answer to assure that a court of limited jurisdiction remains only a court of limited jurisdiction.

Example (ii). Peaceful is convicted of bigamy. Her second husband now sues her for the intentional infliction of emotional harm caused by learning of Peaceful's bigamy. Peaceful seeks to deny she ever married Husband No. 1. What result?

Peaceful will be estopped from denying the fact of the first marriage because that issue actually and necessarily was decided in the first lawsuit.

b. Mutuality of Estoppel—the doctrine that said you could claim estoppel only if you would have been bound by the earlier judgment had it gone against you—is not so hard and fast a rule as once it was.

Example. Mr. and Mrs. Passenger and 98 others are passengers on Freeflight Airline. The plane crashes; all 100 passengers are badly injured. Mr. Passenger sues Freeflight (Mr. Passenger v. Freeflight) and wins. Mrs. Passenger may now be able to sue Freeflight and use

the decision in *Mr. Passenger v. Freeflight* (finding Freeflight liable) in her lawsuit even though she was not a party to the lawsuit. If, however, Mr. Passenger sued Freeflight and lost, Freeflight could not use *Mr. Passenger v. Freeflight* to prevent Mrs. Passenger from relitigating the issue of Freeflight's liability.

O. 28 U.S.C. Section 1738

Basically, section 1738 is the federal statutory equivalent of the constitutional full faith and credit requirement that binds state courts.[117] It requires federal courts to give the same preclusive effect to a judgment (claim preclusion) and to issues necessarily decided (issue preclusion) as that which would be given by the rendering court.[118] Congress may by particular legislation override section 1738. Where a particular subject matter is exclusive to the federal courts the Court may (but need not) find that "the concerns underlying a particular grant of exclusive jurisdiction justify a finding of an implied partial repeal of section 1738" by the Congress.[119]

V. APPENDIX

SELECTED STATUTES RELEVANT TO CONSTITUTIONAL LITIGATION

28 U.S.C. § 2403 (1994) ("Intervention by the United States or a State; constitutional question"). When the constitutionality of a federal statute is raised, section 2403(a) requires certification of the question to the Attorney General of the United States and entitles her to intervene in the litigation. When the constitutionality of a state statute is raised, section 2403(b) requires certification of the constitutional question to the attorney general of that state and entitles her to intervene in the litigation.

28 U.S.C. § 1738 (1994) ("State and territorial statutes and judicial proceedings; full faith and credit"). Section 1738 requires that federal courts give a judgment of a state court the same full faith and credit (claim and issue preclusion) that would be given by that state's courts.

28 U.S.C. § 1658 (1994) ("Time limitations on the commencement of civil actions arising under Acts of Congress"). Section 1658 establishes a 4-year statute of limitations for federal statutes enacted after Dec. 1, 1990.

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117. *See* U.S. CONST. art. IV, § 1.
118. *See* Kremer v. Chemical Const. Corp., 456 U.S. 461, 470 (1982); Allen v. McCurry, 449 U.S. 90, 95-96 (1980).
119. Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 386 (1985).

42 U.S.C. § 1981 (1994) ("Equal rights under the law"). Section 1981 guarantees rights "equal to white citizens" to, among other things, make and enforce contracts, sue, and exercise property rights.

42 U.S.C. § 1983 (1994 & Supp III 1997) ("Civil action for deprivation of rights"). Section 1983 authorizes suit against an officer of a state acting in his official capacity for violation of a federal constitutional or statutory right.

42 U.S.C. § 1985 (1994). ("Conspiracy to interfere with civil rights"). Section 1985 provides a civil action for damages if two or more persons conspire to prevent a federal officer from performing his duties, to obstruct justice, or to deprive persons of their right to equal protection of the laws or to vote.

42 U.S.C. § 1988 (1994 & Supp. III 1997) ("Proceedings in vindication of civil rights"). Section 1988 permits recovery of attorney fees and expert witness fees as part of litigation costs pursuant to 42 U.S.C. §§ 1981, 1981a, 1982, 1983, 1985, 1986, and 13981; Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; and Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d.

42 U.S.C. § 1997e (1994 & Supp. III 1997) ("Suits by prisoners"). Section 1997e requires exhaustion of administrative remedies in section 1983 prison conditions litigation.

18 U.S.C. § 3626 (1994 & Supp. III 1997) ("Appropriate remedies with respect to prison conditions"). Section 3626 limits prospective relief in prison conditions litigation.

28 U.S.C. § 1915A (1994 & Supp. III 1997) ("Screening"). Section 1915A requires screening of a prisoner suit against the government to assure the claim is neither frivolous nor barred by a claim of immunity.

SELECTED CIVIL RIGHTS STATUTES APPLICABLE IN PARTICULAR CIRCUMSTANCES AND THE CLASSIFICATIONS TO WHICH THEY APPLY

1964 Civil Rights Act

Title II, 42 U.S.C. § 2000a. Public Accommodations.
Race, Color, Religion, National Origin.

Title VI, 42 U.S.C. § 2000d. Federally Assisted Program.
Race, Color, National Origin.

Title VII, 42 U.S.C. § 2000e-2. Employment.
Race, Color, Religion, Sex, National Origin.

Title VI of the 1964 Civil Rights Act was amended by the 1991 Civil Rights Act, 42 U.S.C. § 2000e-5, to specify the remedies available

when both proper and improper reasons exist for an employment decision.

1968 Civil Rights Act and 1988 Amendments

Title VIII, 42 U.S.C. § 3604. Housing.

Race, Color, Religion, Sex, National Origin, Familial Status, Handicap (some only).

1972 Education Amendments

Title IX, 20 U.S.C. §§ 1681 & 1684. Federally Assisted Education.

Sex, Blindness, Visual Impairment.

1973 Rehabilitation Act

Section 504, 29 U.S.C. § 794. Federal Agency or Federally Assisted Program.

Disability (formerly handicap).

1975 and 1990 Education Acts

20 U.S.C. §§ 1400-1487. Public Education.

Disability (formerly handicap).

1990 Americans with Disabilities Act

42 U.S.C. §§ 12101-12213 (1994). Employment, Public Services, Public Accommodation, Transportation.

Disability.

Equal Pay Act

29 U.S.C. § 206(d) (1994). Employment wages. Gender.

Age Discrimination in Employment Act

29 U.S.C. § 623 (1994 & Supp. III 1997). Employment.

Age (at least 40). (Supreme Court declared congressional abrogation unconstitutional. *See* Kimel v. Florida Bd. of Regents, Nos. 98-791, 98-796, 2000 WL 14165 (U.S. Jan. 11, 2000).

STATUTES IN WHICH CONGRESS STATED AN INTENTION TO ABROGATE STATE SOVEREIGN IMMUNITY

The following statutes are among those in which Congress has authorized suits against states. For some of these statutes there may be a question whether the abrogation survives *Seminole Tribe*, 517 U.S. 44 (1996).

Title VII of the 1964 Civil Rights Act, Equal Employment, 42 U.S.C. § 2000e.

Americans with Disabilities Act of 1990, 42 U.S.C. § 12202

Pursuant to 42 U.S.C. § 2000d-7, Civil rights remedies equalization:

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688.

Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-6107.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

The provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.